IN THE

United States Supreme Court

OCTOBER TERM, 1924.

No. 382.

SECOND RUSSIAN INSURANCE COMPANY,
Complainant-Appellant,

against

THOMAS W. MILLER, as Alien Property Custodian, GUY T. ALLEN, as Treasurer of the United States, NEW YORK LIFE INSURANCE & TRUST COMPANY, and ERNST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER, and CARL CHRISTIAN STAHL, individually and as co-partners doing business under the firm name and style of "H. Mutzenbecher, Jr.",
Defendants-Appellees.

BRIEF FOR APPELLEES ERNST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER, and CARL CHRISTIAN STAHL.

HARTWELL CABELL,
Attorney for Defendants-Appellees.

INDEX.

Table of Cases Cited.

In the

United States Supreme Court,

October Term, 1924.

No. 362.

Second Russian Insurance Company,
Complainant-Appellant,

against

Thomas W. Miller, as Alien Property Custodian, Guy F. Allen, as Treasurer of the United States, New York Life Insurance & Trust Company, and Ernst Behre, Herman Franz Matthias Mutzenbecher, Franz Ferdinand Mutzenbecher, and Carl Christian Stahl, individually and as co-partners doing business under the firm name and style of "H. Mutzenbecher, Jr.",
Defendants-Appellees.

BRIEF FOR APPELLEES ERNST BEHRE, HERMAN FRANZ MATTHIAS MUTZENBECHER, FRANZ FERDINAND MUTZENBECHER, and CARL CHRISTIAN STAHL.

Statement.

This case, and two cases brought by the Salamandra Insurance Company, a Russian corpora-

tion, and La Paternelle Insurance Company, a French corporation, against the same defendants were tried together in the District Court. A judgment of dismissal was entered in each case. This is the only one of the cases which has been appealed, and the Circuit Court of Appeals for the Second Circuit unanimously affirmed the decision in the District Court.

The statement of facts contained in appellant's brief is so at variance with the case developed in the trial court, that a re-statement in this brief has been deemed necessary.

H. Mutzenbecher, Jr., a co-partnership with headquarters in Hamburg, Germany, had, for a number of years prior to the commencement of the European War in 1914, conducted a reinsurance general agency. They procured for themselves appointments as general agents for reinsurance for various insurance companies organized and operating under the laws of different states and nations. Their agency contracts generally covered portions of the globe outside the country under whose laws the several insurance companies represented by them had been organized and were conducting business. The Mutzenbechers transacted their business for these companies through sub-agencies which they established in the several countries of the different continents. The business was worldwide and consisted in reinsuring direct writing companies.

In the United States there were two Mutzenbecher sub-agencies, both located in New York City. One of them, Meinel & Wemple, was a New York corporation whose stock was owned partly by the Mutzenbechers and partly by three American citizens, William G. Willcox, Edward Meinel and William Y. Wemple, all of whom took active

part in the management of the New York end of the Mutzenbecher business. The reinsurance business in the United States of the Second Russian Insurance Company was done through this agent. It also handled the business of the Salamandra and Paternelle insurance companies whom the Mutzenbechers represented for reinsurance outside of Russia and France respectively.

The other New York agency (Sumner Ballard & Co.), handled for the Mutzenbechers the business of other insurance companies, reinsuring direct writing companies in America. The representation of these two agencies was entirely distinct and independent, but the testimony shows that the entire business done by both was pooled by the Mutzenbechers in Hamburg, together with business done through their sub-agencies in other parts of the world for the same companies. (Tr. pp. 73, 104, 309 et seq.)

The evidence shows that after the commencement of the European War, and up to the latter part of the year 1916 or early part of 1917, the business which had theretofore been conducted by the Mutzenbechers in the United States for their several companies, including the appellant, continued as theretofore with little or no change. Owing to the exigencies of the situation growing out of the blockade of German ports by the English fleet, there was a change in the matter of commissions due and payable to the Mutzenbechers and their sub-agents, Meinel & Wemple, under the contracts with the several companies. Prior to 1914 the Mutzenbechers were paid their commissions directly by the home offices of the several companies represented by them, including the appellant. The New York sub-agent forwarded to the Mutzenbecher firm their accounts showing

commissions due and expenses incurred, and were paid by the Mutzenbechers. After the blockade went into effect and communication between Germany and the United States became uncertain, the full commissions due to the Mutzenbechers upon the business done by them and their sub-agents was deducted from the premium receipts of the respective companies, including appellant, in New York. The sub-agents retained the amount due to them for services and disbursements, and up to a certain time remitted the balance to the Mutzenbechers at Hamburg by wireless. During the latter part of 1916, the practice again changed and no further remittances were made, the moneys being retained in New York. In the case of the Second Russian the funds seized by the Alien Property Custodian had been withdrawn by Meinel & Wemple from the funds of the Second Russian in their possession or under their control, the part belonging to them had been deducted, and the balance deposited in a different bank and set up on their books as a "Special Account" (Tr. pp. 80, 83).

During the year 1918 after the Alien Property Custodian had demanded an examination of the books of Meinel & Wemple, and while that examination was in progress Meinel & Wemple withdrew this special account and deposited it with the American trustee of the Second Russian Insurance Company (The New York Life Insurance & Trust Co.). At the same time they withdrew a similar special account which had been created with respect to the Salamandra business, and deposited that with the New York Life Insurance & Trust Company where the funds of that Company were also kept.

Upon demand being made by the Alien Property Custodian for these funds, a bill was then filed on behalf of the Salamandra Insurance Co. against the New York Life Insurance & Trust Company praying for an injunction restraining that Company from paying over any of the funds of the Salamandra Insurance Co. to the Alien Property Custodian, one of the grounds relied upon being that the funds in question having been mingled with the other funds of the Salamandra Insurance Co., and could not be segregated.

Upon the hearing, this bill was dismissed. (*Salamandra Ins. Co.* v. *N. Y. Life Ins. & Trust Co.*, 254 Fed. 852).

The evidence showed that remittances had been made by Meinel & Wemple to the Mutzenbechers out of these special accounts practically up to the time the United States entered into the War. Thereafter, they were permitted to accumulate. The existence of the accounts was disclosed by the examination, and the demand of the Alien Property Custodian was not as stated in appellant's brief (p. 2), upon the claim that the plaintiff owed an amount equal to the sum seized, but as will be seen from the terms of the demand itself, set out in the amended bill of complaint (Tr. 6), was for the commissions which were "deducted and segregated from said premium receipts from time to time * * * by or under the order or at the instance of said Meinel & Wemple, Inc. as a 'Suspense Reserve Account' ".

On October 29, 1916 the Russian Government promulgated a decree by the terms of which contracts between Russian and German subjects were declared to be cancelled and commercial intercourse prohibited under penalties.

Shortly after the passage of this decree, proposed agency contracts, in the form of letters, were forwarded by each of the Russian companies, the Salamandra and Second Russian, to Meinel & Wemple. The proposal relative to the Second Russian will be found printed in the transcript, pages 926 to 933, both inclusive. The Salamandra proposal was identical in terms with that relating to the Second Russian, although the accompanying letter bore a different date, and it is quite evident that they were prepared by the same hand or that one was copied from the other.

The testimony showed that Meinel & Wemple had mailed formal acceptances of these contracts to the head offices of the respective companies, and the principal question of fact involved in the case, is whether these so-called transfers of agency from the Mutzenbechers to Meinel & Wemple were made in good faith and actually intended to be transfers, or whether the transaction in each case was colorable and done for the purpose of continuing business relations with Mutzenbecher, Jr., while at the same time appearing to have terminated all direct relations with that firm. A large part of the testimony adduced in the court below bears directly upon this question of fact.

Much of the testimony relied upon by the District Court in reaching its conclusion is to be found in Exhibits "D" and "F" which were offered in evidence at the trial, but by stipulation were not printed in the Circuit Court of Appeals record (Tr. 958, 959). These exhibits contain the examination of the officers of Meinel & Wemple, Inc. and the many letters and telegrams exchanged between Meinel & Wemple, Inc. on the one hand, and the Second Russian, the Mutzenbecher firm, and Mutzenbecher sub-agencies on the other. When read

together with the admissions of the officers of Meinel & Wemple, Inc. they form convincing proof of the facts as claimed by the defendants and as found by the court.

From this evidence, and the other testimony in the case which bears upon the good faith of the so-called transfer of agency, the following general method of doing business is shown;—

The American sub-agent, whom we shall refer to as Meinel, with the assistance of Mutzenbecher, solicited reinsurance treaties with various direct writing companies, both American and foreign, who were doing business in the United States. A treaty having been obtained, the treaty company proceeded to report to Meinel upon bordereaux, the individual cessions reinsured, showing the name of the assured, the amount of cession, rate of premium, location of property, etc. These bordereaux were forwarded by Meinel to Mutzenbecher in Hamburg. Meinel kept the accounts of each company upon data furnished from Hamburg, where the principal books of account were kept. In addition, Meinel looked after the trust funds in this country which were in charge of statutory trustees and drew up the reports required by law to be made for each company to the insurance officials in each state in which such company was authorized to do business. Up to the beginning of the European War, Meinel collected the premiums due from the direct writing companies, deposited these premiums in the bank accounts of the several reinsuring companies and held them or remitted them under instructions from Mutzenbecher. As already stated, after the War commenced, this method was changed under instructions from Mutzenbecher, with the consent of the several companies, by having Meinel de-

duct the commissions due Mutzenbecher instead of accounting to Mutzenbecher for the full premiums. From the sums so deducted, Meinel paid itself and either forwarded the balance to Mutzenbecher, or segregated it under a special account.

In the Mutzenbecher office at Hamburg, the business was mapped and carded (a method of recording), retrocessions were attended to, and all of the accounts of the companies with respect to their American business were kept.

It further appears from the testimony (Tr. pp. 104, 399), that the Mutzenbechers operated a pool whereby all of the business received by each of their companies who were pool partners, were thrown into a common pot together with all the expenses incurred in connection with such business, including agency commissions, and each company took a fixed percentage of the whole volume. If the operations of the companies as a whole showed a profit, this fixed percentage governed the extent of each company's participation in such profit. (Losses were treated in the same way.)

The importance of the work done in Hamburg is admitted by the witnesses for the plaintiff. In speaking of mapping and retroceding, the witness Edward Meinel stated (Exhibit "F", p. 16), that it was a vital part of the business. The witness Belotsvetov (Tr. 396, et seq.), gives an interesting account of the working of the business as conducted by Mutzenbecher, and emphasizes the importance of Mutzenbecher's work from the standpoint of the companies.

The commencement of the War in 1914 did not at first materially interfere with the transaction of the American business. A mail agent was appointed by H. Mutzenbecher, first in Holland, and afterwards in Copenhagen, through whom all com-

munications from Russia or America intended for Mutzenbecher in Hamburg, were transmitted. Bordereaux and other data in connection with the business continued to be forwarded by Meinel through this Copenhagen agent (Clausen), up to the passage of our Trading With the Enemy Act in October, 1917, and in fact, several messages were sent after that law had gone into effect.

The plaintiff contended that the transfer of the agency from Mutzenbecher to Meinel in the early part of the year 1917 was done in good faith and with a view of obeying the Russian law of October 29, 1916. The defendants below insisted, and the lower courts have found the fact to be, that the so-called contract between Meinel and the plaintiff was a mere colorable transfer, understood and intended between all the parties to be for the purpose of covering up a continuance of business relations between the Second Russian and Mutzenbecher. In disposing of this question, the Circuit Court of Appeals said (297 Fed. 408):

> "We cannot agree with the argument of the appellant that this agreement with Meinel & Wemple, Inc. covered only business then and thereafter prosecuted through Meinel & Wemple, Inc. On the contrary, we are satisfied the parties intended to carry on the former business with H. Mutzenbecher, Jr. under the terms of the original contract, cloaked or covered by sub-agency for the purpose of avoiding the Russian ukase. The various business activities and correspondence between Clausen and Meinel & Wemple, Inc., the method of prosecuting this reinsurance and retrocession business, all lead to this conclusion."

The evidence amply sustains this conclusion. The testimony shows that after the new agency

agreements were received by Meinel and accepted, there was no change in the method of transacting the business. (Exhibit "F", p. 101-2). The witness, Wemple, testified that it was practically impossible for them to transact the business without H. Mutzenbecher, Jr. (Exhibit "F", p. 97). Meinel & Wemple, with a contract entitling them to 3½% commission (the amount that had been paid to Mutzenbecher), continued to retain for themselves only ¾ of 1%, plus their expenses, which was the amount they were entitled to under their contract with Mutzenbecher. The balance was, as pointed out above, when it could no longer be transmitted owing to the war, carried in their own name in a suspense account in another bank. The plaintiff's witnesses moreover, freely admitted that by reason of the fact that the Mutzenbechers were in possession of the maps which contained a record of the business, and further by reason of the pooling arrangements which they knew to exist, Meinel could do nothing with respect to such business that it had not done as subagent. The making of a new set of insurance maps would have called for an expenditure of money which would have been prohibitive (Tr. p. 104), and even with complete maps, in the absence of a knowledge of the particulars of the Hamburg pool, and of the retrocession arrangements made in Hamburg, no retrocession arrangements could have been entered into by Meinel for the protection of the individual Russian companies represented in their office. Indeed, the witness Wemple, upon his examination by representatives of the Alien Property Custodian testified that it was practically impossible for them to transact the business without H. Mutzenbecher, Jr. (Exhibit "F", p. 97).

Appellant states in its brief (p. 29), that a large part of the printed record refers to the cases of Salamandra and Paternelle, tried simultaneously with this case and has no application to the case of the Second Russian. The testimony with respect to each of the companies is relevant on questions involving the acts of the others, because the proof is ample that they were acting in concert and under a common plan known to, and participated in, by the Mutzenbechers. So close was the accord, that five days before Meinel received from the Salamandra in Petersburg the so-called new agency contract, as to the forwarding of which it had to that point received not the slightest intimation, it received a wireless from Mutzenbecher in Hamburg, "You may sign agency agreement which you will receive from your company". (Exhibit 55 to Trial Exhibit "D"). The Second Russian contract, identical in terms, was not received until some months later, but upon receipt was accepted in the identical terms of the acceptance of the Salamandra contract.

Savitch, president of the Second Russian, testified that the Second Russian and the Salamandra, whose offices were across the street from each other, were in constant touch with respect to the American business, and that a letter written by one regarding that business was, to all intents and purposes, written by both. (Tr. 210, 239, 240). He further admitted receiving bordereaux, accounts, etc. from Clausen the Mutzenbecher "mail box in Copenhagen", after the so-called agency transfer, just as he had received them before. In fact, an examination of the record will show that not the slightest change was made in the manner of conducting the business after these

agency contracts had been received and accepted by Meinel. Bordereaux containing all the details of the business were regularly forwarded to Clausen so long as communication was open, and thereafter were made and retained in the New York office for delivery at some future date when such delivery could be made. The accounts of the several companies, including the Second Russian, were kept and forwarded to Clausen, map corrections, which were quite important in the recording of the business in Hamburg, continued to be forwarded, and the business in every detail went forward with the Mutzenbechers until the passage of the Trading With the Enemy Act by Congress in October, 1917.

If this Court considers the facts, the testimony at the joint trial of the three cases in the District Court will have to be considered in its entirety, and as has been pointed out, a most important part of this testimony does not appear in the printed record here before the Court.

ARGUMENT.

The right of the Alien Property Custodian to retain the funds seized, depends upon enemy ownership, which, as presented by this case, is a question of fact and not of law.

At the outset we confess a difficulty in comprehending appellant's argument. He starts by declaring it to be a general rule of *international*

law, common to all nations, that commercial intercourse of every kind is forbidden between nationals of belligerent powers. Statements to this effect can be found, but they are incorrect. It has been repeatedly pointed out both by courts and text writers, that this subject is not covered by international law, but is dealt with by each country through its municipal law, and the laws of the several civilized countries are by no means alike in this respect. In England and America commercial intercourse is forbidden, but in the continental countries generally the rule is the other way. There, such intercourse is uninterrupted until prohibited by law. The German law on this subject, and incidentally, the French law, is shown in the testimony of Dr. Grossman, a German lawyer called as an expert (Tr. 187, et seq.).

Our adversary's argument then proceeds to consider the legal effect of the Russian act of October 29, 1916. Having concluded that as a result of that act the contracts between Germans and Russians were, at least so far as Russia was concerned, annulled, the argument proceeds that since appellant here is a Russian corporation and exists in the United States only by fiction of law and the comity of nations, the doctrine announced by this Court in *Canada Southern Ry. Co.* v. *Gebhard* (109 U. S. 527), should be applied and the Russian decree should be given extra-territorial effect in the United States to the extent of a holding by our courts, that the money seized by the Alien Property Custodian could not belong to Mutzenbecher because the Mutzenbecher contract with the Second Russian had been annulled by law.

It may be said in passing, that the *Canada Southern* case, *supra,* dealt with a law directly affecting a corporate organization and intended by

the sovereign to control the corporation as such. Little difficulty can be found in enforcing such a law in a friendly country under the rules of comity, and that case has been extensively followed by the courts of last resort in other states in dealing with the powers and liabilities of foreign corporations. The Russian ukase under discussion, however, is addressed to individuals and all classes of trade and industrial associations and corporations, and apparently undertakes to deal with contracts of every kind, executory and executed. It is a criminal statute and if it means what it has been interpreted to mean, it is entirely at variance with our own public policy and is not entitled to enforcement here.

Bank of Augusta v. *Earle* (13 Peters 519).
Hilton v. *Guyot* (159 U. S. 113).
Russian Republic v. *Cibrario* (235 N. Y. 255).
Bradstreet v. *Neptune Ins. Co.* (3 Sumner 600).

If this were a case in which Mutzenbecher was seeking to compel the performance of its contract with the Second Russian or asking for damages for non-performance, this Court might well be called upon to consider the effect of the Russian decree as bearing upon the rights of the parties, although in that case, they would be faced with the difficult situation of determining whether a contract made and to be performed in Germany could be controlled as to the German party, by the law of the domicile of the other party.

Whether the Russian ukase prohibited the continuance of this contract or not, the business con-

tinued to be transacted between the parties and Meinel in New York, as the result of which certain moneys, as the courts below have found, were set aside as property of the Mutzenbechers. To hold that because the transactions out of which this profit to the Germans arose were prohibited by the laws of Russia; and that therefore these funds cannot be seized by the United States Government, is to hold that the fruits of an illegal venture are immune by reason of the illegality. The line of argument would seem to be that regardless of the intention of the parties, since the Second Russian was guilty of a fraud on its own government in continuing to transact this business with the Mutzenbechers through an indirect channel after the ukase of October, 1916, it can now defeat the seizure by the U. S. Government of the funds as enemy property by declaring that since it had no right to pay these funds to the Mutzenbechers, it can now elect to consider them as never having been paid and as therefore still belonging to it.

It might very well be, that if nothing had ever been paid, and if the Mutzenbecher profits remained in the form of a debt due from the Russian company, a collection of that debt would have been attended with considerable difficulty, but these funds were segregated and set apart, and as the courts below found, were set apart as belonging to the Mutzenbechers. The demand of the Custodian was for specific money, not a debt or credit.

To carry our opponent's argument a little farther, suppose the transaction out of which this fund arose had been between an American citizen and a German after war was declared and further commercial intercourse forbidden. Suppose the

profits to the German resulting from the venture had been segregated and deposited in good faith by the American partner in the illegal enterprise, the purpose being to permit it to remain so deposited until it could be safely transferred to the German. Suppose the Alien Property Custodian, having discovered these facts, seized the funds so derived and so deposited, as enemy property. Would the American partner be permitted to claim that since the entire transaction was illegal, it must be considered a nullity and he could reclaim the funds as his own which he had already segregated and delivered so far as possible, to his German associate?

The argument under the second proposition of appellant's brief (p. 26) commences with the statement "Seizure was made by the Custodian as of title to a *debt* due from the reinsurance Company to Mutzenbecher, Jr. vested in the United States by virtue of their Trading with the Enemy Act (fol. 50) • • • Mutzenbecher's firm was permitted to file an answer (fols. 64-99) and has been the most active defendant, making claims of money seized," etc.

As has been pointed out, the demand was for a definite fund that had been segregated by Meinel acting as the representative of Mutzenbecher with the express consent of the Second Russian. It was, therefore, in no sense the seizure of a *debt due*. It is true when it became evident to Meinel that a demand would be made for these funds as "enemy funds", and to evade if possible the seizure, Meinel without any instruction from the Second Russian, or from the Mutzenbechers, transferred the fund to the New York Life Insurance & Trust Company, who was the custodian

of the funds of the Second Russian. In dealing with this point in the Salamandra case (254 Fed. *852, 856*), where the same procedure had been followed by Meinel, Judge Knox said:

> "I am also of opinion that, granting for the moment that the determination of the Alien Property Custodian is correct as to the alien character of the fund in question (which fact I do not find), such alien character is not divested by reason of the mixing of the fund with another fund which unquestionably is impressed with a trust for the benefit of American policyholders of the complainant. A voluntary and gratuitous increase of a trust fund will not be permitted to continue to the prejudice of a third party, when the fund is of such nature that the voluntary and gratuitous increase may be followed and segregated, all without the diminution or impairment of any security theretofore held for the benefit of the *cestuis que trustent* of the original fund. A tainted fund may not be given immunity from the penalties attaching thereto by an unlawful and unauthorized mixture with a fund enjoying immunities."

The statement in the quotation from appellant's brief, that the Mutzenbechers are making claim to the money seized is misleading. The Mutzenbechers appeared as defendants and contended that the money seized was their money and should be retained by the Alien Property Custodian as enemy funds. Their contention is the same on this appeal.

It is submitted that the decree of the court below be affirmed, and that the funds remain in the hands of the Custodian until disposed of as Congress may direct.

Respectfully submitted,

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